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Attorneys for Defendant
EXERGEN CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE DIVISION)

SAN FRANCISCO TECHNOLOGY INC.,

Plaintiff,

v.

THE GLAD PRODUCTS COMPANY, BAJER
DESIGN & MARKETING INC., BAYER
CORPORATION, BRIGHT IMAGE
CORPORATION, CHURCH & DWIGHT CO.
INC., COLGAGE-PALMOLIVE COMPANY,
COMBE INCORPORATED, THE DIAL
CORPORATION, EXERGEN CORPORATION,
GLAXOSMITHKLINE LLC, HI-TECH
PHARMACAL CO. INC., JOHNSON
PRODUCTS COMPANY INC., MAYBELLINE
LLC, MCNEIL-PPC INC., MEDTECH
PRODUCTS INC., PLAYTEX PRODUCTS
INC., RECKITT BENCKISER INC., ROCHE
DIAGNOSTICS CORPORATION,
SOFTSHEEN-CARSON LLC, SUN
PRODUCTS CORPORATION, SUNSTART
AMERICAS INC.,

Defendants.

Case No. CV10-00966 JF

**DEFENDANT EXERGEN
CORPORATION'S NOTICE OF
CONSTITUTIONAL CHALLENGE**

Pursuant to Fed. R. Civ. P. 5.1 and N.D. Cal. Civ. L.R. 3-8, notice is hereby given that Defendant Exergen Corporation ("Exergen") has challenged the constitutionality of 35 U.S.C. § 292(b), to the extent that statute is construed to effect a delegation of executive authority in

1 violation of U.S. Const., Art. II, § 3. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 112
2 S.Ct. 2130 (1992); *Morrison v. Olson*, 487 U.S. 654, 696, 108 S.Ct. 2597 (1988). Exergen raises
3 its challenge in its Motion to Dismiss, Sever, or Transfer, filed on June 30, 2010.

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5 Dated: June 30, 2010

FISH & RICHARDSON P.C.

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7 By: /s/ Robert J. Kent

Robert J. Kent

8 Attorneys for Defendant
9 EXERGEN CORPORATION

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 30, 2010, all counsel of record who are deemed to have consented to electronic service are being served with a copy of the **DEFENDANT EXERGEN CORPORATION'S NOTICE OF CONSTITUTIONAL CHALLENGE** via the Court's CM/ECF system pursuant to Local Rule 5-4 and General Order 45. Any other counsel of record will be served by first class mail.

Pursuant to Federal Rules of Civil Procedure 5.1(a)(2), the undersigned hereby further certified that that on June 30, 2010, **DEFENDANT EXERGEN CORPORATION'S NOTICE OF CONSTITUTIONAL CHALLENGE** was served on the U.S. Attorney General by certified mail, return receipt requested, at the following address:

United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Pursuant to Local Rule 3-8, the undersigned hereby further certified that that on June 30, 2010, **DEFENDANT EXERGEN CORPORATION'S NOTICE OF CONSTITUTIONAL CHALLENGE** was served on the U.S. Attorney for the Northern District of California by certified mail, return receipt requested, at the following address:

United States Attorney for the Northern District of California
Heritage Bank Building
150 Almaden Blvd. Suite 900
San Jose, CA 95113

/s/Robert J. Kent

Robert J. Kent

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